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No. 00-

IN THE

Supreme Court of the United States

JAMES YORK BROWN,

Petitioner,

v.

ROLAND SCOTT LYFORD, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Can a Texas District Attorney Pro Tem, who replaces the elected District Attorney in the matter to which he is appointed and assumes the full powers and duties of the elected District Attorney in that matter, be a final policymaker for a Texas county so as to impose *Monell* liability on the county for his unconstitutional acts committed in an investigatory capacity?

LIST OF PARTIES

The parties in the proceedings below are Petitioner, James York Brown, who was also Appellant before the Fifth Circuit Court of Appeals; and Respondents, Roland Scott Lyford, Ann Goar, Debbie Minshew, Brooks Fleig, Steve Baggs and Upshur County, Texas, who were Appellees before the Fifth Circuit Court of Appeals.

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Appendix B — Order On Defendants' Motions For Summary Judgment And Final Judgment Of The United States District Court For The Eastern District Of Texas, Tyler Division Dated And Filed September 29, 1999 ..... 15a

Petitioner James York Brown respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on February 20, 2001.

OPINIONS BELOW

The opinion of the Fifth Circuit is reported at 243 F.3d 185 (5th Cir. 2001) and is set out in Appendix A, pp. 1a through 14a, *infra*. The opinion of District Court for the Eastern District of Texas is not reported and is set out in Appendix B, pp. 15a through 38a, *infra*.

STATEMENT OF JURISDICTION

This petition seeks review of the February 20, 2001 judgment and opinion of the Fifth Circuit Court of Appeals in cause number 99-41297. No petition for rehearing was sought. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). This petition is filed within ninety (90) days of the date of the Fifth Circuit's judgment and opinion, as required by 28 U.S.C. § 2101(c).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

This case involves a 42 U.S.C. § 1983 civil rights claim brought by Petitioner against Respondents alleging violations of his Fourth Amendment right to be free from malicious prosecution, unreasonable seizure, false arrest and false imprisonment.

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

42 U.S.C. § 1983 provides:

> § 1983. Civil action for deprivation of rights.
>
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Petitioner brought this action seeking damages against Respondents pursuant to 42 U.S.C. § 1983. Jurisdiction of such action in this district court was provided by 28 U.S.C. § 1331. The district court granted all of Respondents' motions for summary judgment and Petitioner appealed the grant of these summary judgments to the Fifth Circuit Court of Appeals. The Fifth Circuit Court of Appeals had jurisdiction of the appeal pursuant to 28 U.S.C. § 1291. The Fifth Circuit affirmed the district court's grant of summary judgment to Respondents. The following facts, arguments and authorities illustrate the necessity for this Court's grant of this petition and the accompanying reversal of the lower courts' decisions dismissing Petitioner's civil rights claims.

On January 6, 1992, Kelly Wilson, a 17 year old resident of Gilmer, Texas, was reported missing. Petitioner was assigned the case as part of his duties as a police officer with the Gilmer, Texas Police Department.

Concurrently with Petitioner's investigation, an unrelated case involving several individuals referred to as the "Kerrs" was being pursued in Upshur County. That case involved multiple acts of alleged child abuse and the children involved were under the supervision of Goar and Minshew. Baggs, who later enlisted Fleig, were brought into that case to assist Goar and Minshew after some of the children involved allegedly made disclosures concerning satanic cult activity by the Kerrs. Those disclosures grew exponentially from statements about the devil and the use of costumes to allegations of mutilation, killing, and eating of animals, babies and other human beings. The disclosures by the children continued from June 1992 through the search in May 1993 of the Kerr's home but they never mentioned Kelly Wilson or Petitioner.

On June 28, 1993, one of the Kerr children, referred to as "RS", allegedly made the initial disclosure concerning the abduction, rape, and murder of Kelly Wilson by the Kerrs. RS had previously been removed from his home and he was placed in a foster home where he was exposed to the "holding technique" which was the first time he disclosed any information about sexual abuse or the Kelly Wilson disappearance. The holding technique was described by Dr. Bruce Perry as highly controversial and in many cases is misused. The way it was applied in this case by people who were not trained constituted torture.

After being instructed to inform Petitioner of RS's statement concerning the Kelly Wilson disappearance, Goar and Minshew talked to Petitioner, who informed Goar and Minshew that he had investigated the child's allegations and that a central figure in his abduction story, Wendell Kerr, was not even in the State of Texas during the time of Kelly Wilson's disappearance. Goar and Minshew apparently interpreted Petitioner's statements as threatening. Approximately one month later according to Respondents, RS allegedly implicated Petitioner in the disappearance of Kelly Wilson. That child is the only one of the Kerr children who ever implicated Petitioner in any way, and was one of the prosecution's two star witnesses in the indictment against Petitioner.

In July 1993, Goar and Minshew were told by Tim Cone, Upshur County District Attorney, that he intended to withdraw from the Kerr child abuse cases because of a conflict of interest. Lyford agreed to step in and prosecute the child abuse cases, and was appointed District Attorney Pro Tem on October 25, 1993. At Lyford's request, Baggs and Fleig were hired as criminal investigators for Upshur County on October 29, 1993.

On December 14, 1993, Lyford met with Petitioner, the only person who was questioning the Respondent's theory of the disappearance of Kelly Wilson. Lyford informed Petitioner that Lyford was now investigating Kelly Wilson and, "I don't want you messing with my investigation of Kelly Wilson." He further admits telling Petitioner, "if you mess with my investigation, we're going to have a problem." Lyford was satisfied that Petitioner was scared at the conclusion of the meeting.

The following day, December 15, 1993, Lyford drove to Van Buren, Arkansas to personally investigate the USA Trucking records of Wendell Kerr in an effort to discredit Wendell Kerr's alibi that he was not in the State of Texas at the time the Wilson abduction allegedly occurred. Lyford met with authorities at the trucking company and concluded that the records appeared legitimate and he needed to take them back "for DPS analysis." Lyford's position was that the records must have been forged; the only conclusion that would save his investigation. The documents were later examined and a conclusion reached in one day that the documents were authentic and Wendell Kerr's signatures were not forgeries.

After Lyford made the trip to Arkansas to discuss Wendell Kerr's employment records, Lyford tried to elicit the help of his wife, Wanda Kerr, to explain away Wendell Kerr's alibi. Wanda Kerr broke down and told Lyford, "I tried to tell ya'll at the welfare office I didn't know nothing about it. But ya'll kept saying I did." Wanda Kerr said she developed her story from what the investigators were saying. When she tried to tell them the truth, all they wanted from her was their version of the truth.

After Wanda Kerr recanted her confession, the Respondents were left with RS and Connie Martin, another adult member of the Kerr family, as their only "witnesses" to the abduction and murder of Kelly Wilson by the Kerrs. After long periods of improper and suggestive questioning, Connie Martin began to tell a story of Kelly Wilson being kept for an extended period of time, tortured, murdered and her body parts being eaten in Satanic rituals.

On December 30, 1993, Martin for the first time became the one and only adult to implicate Petitioner in the abduction, torture, and murder of Kelly Wilson. Lyford, in the personal journal he kept throughout the case investigation, said that at the conclusion of an extensive interview with Connie Martin, she requested to talk to Baggs, Lyford, and Minshew and stated, "By the way, you asked me if there were any policemen out there when Kelly got killed, and I didn't want to tell you, but yeah, there were some policemen there and Officer Brown was there and he had been there before."

Respondents, concerned that if they waited that they would "lose credibility", presented their case to a newly empaneled Grand Jury on January 21, 1994 in an attempt to indict Petitioner, Wendell Kerr, and other members of the Kerr family. On January 21, 1994, Petitioner was indicted, arrested, and imprisoned facing a potential death sentence. At some point after this, the Texas Attorney General's Prosecutor Assistance Division began looking into what Respondents had created with a view of possibly becoming involved in the case. Concurrent with that, Dr. Bruce Perry was asked by the state offices of Child Protective Services to provide consultation on the case.

Dr. Perry was struck by the "bunker mentality" of Respondents. It further became clear that Goar and Minshew were extremely emotionally tied into the case and their judgment needed to be evaluated. It was apparent to Dr. Perry that the boundaries between the authorities responsible for investigating the murder and the authorities responsible for providing mental health and child protective care for the Kerr children (including RS) had been completely blurred. Dr. Perry formed the opinion that RS's initial disclosure was the result of a pattern of "systematic coercion." Dr. Perry concluded that RS had been literally tortured with the holding technique and "forced to say what these people wanted him to say."

As part of Dr. Perry's efforts to evaluate Respondents' case, he also interviewed Lyford's adult witnesses, Martin and Wanda Kerr. He also listened to whatever tapes were provided by Respondents of their interviews with Martin and Wanda Kerr and reviewed all other evidence provided by them. *It was his opinion that Respondents Team coerced, put words in their mouths, and terrorized both Connie Martin and Wanda Kerr.* The Respondents were alternatingly isolative, coercive, and nice to Connie Martin and Wanda Kerr until Respondents were able to "elicit what they want." Dr. Perry concluded that Respondents were using "key elements of the psychology of mind control" with Martin and Wanda Kerr.

In response to a question regarding Dr. Perry's impression of the tape recorded interviews of Wanda Kerr and Connie Martin, Dr. Perry stated,

> I was actually quite ashamed to be an American. I couldn't even believe that in the United States

that this kind of interviewing could take place. These poor — and believe me — both of these women hurt their children — *but these women were systematically coerced in the most heinous fashion*. They were interviewed for hours on end. Any response that didn't meet the wishes or desires of the interviewers was not accepted. They were threatened with all kinds of horrible things. They were subtly coerced. They were psychologically manipulated. It was the most disturbing stuff I have ever listened to. And believe me, I've seen some incredibly bad stuff. This is just disgraceful. The thing that was most disturbing for me was that I knew that this style of interviewing with these adults was also taking place with these kids, and they were stupid enough to videotape some of them and illustrate how coercive they were with these kids. But I know that for every hour of video tape and probably for every hour of audio tape that we have about these coercive techniques, there were probably ten more hours of coercive treatment. And the image of little RS and these other kids who have come from in some cases a stable, consistent, nurturing setting or even these kids that have come from some destructive setting to go into an even more destructive setting is just horrible. And it was embarrassing, and I was just — I won't go on.

As observed by Dr. Perry;

If people didn't believe what Respondents were saying, they stayed closer and closer and closer to themselves. They became more isolated, more

> insulated. And if they sensed that somebody didn't believe what they were going to say, they would either not disclose everything, or they would distort some of the things they said to make their story more believable to you. And ultimately, they became this very encrusted group of five or six people who had a very, very, very distorted view of the world.

Respondents' viewpoint was "if you don't believe everything, then somehow you are suspect as being a part of it — it's a very paranoid view; and if you don't believe it, then you're going to hurt us in this and you might even be a part of it."

Petitioner, an experienced police officer, did not believe Respondents' version of the Kelly Wilson disappearance, told them so, and because of that, in their view, became part of it. His indictment, arrest and incarceration resulted from Respondents' objectively unreasonable conduct and actions as detailed herein.

REASONS FOR GRANTING THE WRIT

The Fifth Circuit's decision that a District Attorney Pro Tem cannot be a final policymaker for purposes of establishing *Monell* liability against a Texas County under 42 U.S.C. § 1983 is in conflict with relevant decisions of the Court.

I.

MUNICIPAL LIABILITY UNDER § 1983

Petitioner sought to hold Respondent Upshur County, Texas liable for the unconstitutional acts visited upon him by Lyford, Fleig and Baggs under principles outlined by this Court in *Monell v. Department of Social Servs.*, 435 U.S. 658 (1978). In response to Petitioner's allegations of *Monell* liability against it, Upshur County moved for summary judgment on two grounds:

(1) That Lyford was a state actor and not a policymaking official for Upshur County; and,

(2) That Upshur County cannot be held liable for any alleged unconstitutional acts of Lyford, Fleig or Braggs because they are entitled to qualified immunity.

The district court seized upon this second ground and held that because Lyford enjoyed qualified immunity, Upshur County was also not subject to suit, citing *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986). (Appendix B at 36a).

The Fifth Circuit rejected the district court's stated reason for granting Upshur County's summary judgment motion noting that *Heller* only applies if there is no claim stated against the government official. In that case there is no liability to pass through to the county. When, however, a plaintiff states a claim but the official is protected by qualified immunity, then the defense protects only the individual officer, not the municipality. (Appendix A at 13a). Accordingly, the Fifth Circuit discussed whether or not Lyford was a policymaking official for Upshur County.

The Fifth Circuit held that Lyford could not be a policymaking official for Upshur County because his status as a district attorney pro tem was too limited for him to be considered to have policymaking authority for Upshur County. (Appendix A at 14a). The Fifth Circuit placed great emphasis upon the fact that Lyford was a "one case" prosecutor and that he could not hire and fire employees. However, the Fifth Circuit, in so holding, misapplies this Court's prior precedent concerning the parameters of policymaking authority so as to impose *Monell* liability.

In order to prevail against Upshur County, Petitioner was required to allege and prove facts which, if true, establish the existence of constitutional violations caused by the County's adoption, or failure to adopt, a particular policy. *Colle v. Brazos Cty. Tex.*, 981 F.2d 237, 246 (5th Cir. 1993). This is because this Court, in *Monell* rejected respondeat superior as the governing rule of legal responsibility in § 1983 actions brought directly against local government entities. Under *Monell*, municipal liability must be based upon the enforcement of a municipal policy or custom, and not upon the employment of a constitutional tort feasor. "[I]t is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts injury that the government as an entity is responsible under §1983." *Id.* at 694.

"A court's task is to 'identify those officials or governmental bodies who speak with final policymaking authority for the local government actor concerning the action alleged to have caused the particular constitutional or statutory violation at issue.' " *McMillian v. Monroe County, Ala.*, 520 U.S. 781, 784-85 (1997) (quoting *Jett v. Dallas*

Indep. Sch. Dist., 491 U.S. 701, 737 (1989). This Court's cases on the liability of local governments under § 1983 instruct us to ask whether governmental officials are policymakers for the local government in a particular area, or on a particular issue and that our inquiry is dependent on an analysis of state law. *Id.* at 786. *Cf. Jett* 491 U.S. at 737. (" '[W]hether a particular official has final policymaking authority' is a question of state law[.]' " (quoting *St. Louis v. Praprotnik*, 485 U.S. 112, 123 (1998). *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986). But our understanding of the actual function of a governmental official, in a particular area, will necessarily be dependent on the definition of the official's functions under relevant state law." *McMillian*, 520 U.S. at 786 (citing *Regents of Univ. of Cal. v. Doe*, 519 U.S. 425, 429 n.5 (1997) ("[T]he federal question can be answered only after considering the provisions of state law that define the agency's character.")

This Court has essentially stated that municipal policy may be made in three different ways. The clearest type of policy is one formally embodied in a "policy statement, ordinance, regulation or decision officially adopted and promulgated" by the municipality's lawmaking body. *Monell* at 670. Additionally, municipal policy may be based upon "constitutional deprivations visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decision making channels." *Id.* at 694. Municipal liability may also be premised upon a single edict or act by a municipal official with final policy making authority. *See generally St. Louis v. Praprotnik*, 485 U.S. 112 (1988); *Pembaur v. Cincinnati*, 475 U.S. 469 (1986). The contours of § 1983 municipal liability were further refined by this Court in *City of Canton v. Harris*, 489 U.S. 378 (1989). In *City of Canton*, this Court

specifically rejected a city's argument that a municipality can be found liable under § 1983 only when the policy in question is itself unconstitutional, finding that a facially constitutional policy can be applied in an unconstitutional manner.

Under Texas law, it is clear that an elected district attorney can be a final policy maker for a county government for purposes of imposing *Monell* liability. *See Davis v. Ector County, Tex.* 40 F.3d 777, 784 (5th Cir. 1994). In *Davis*, Ector County contended the district court erred in finding that its district attorney was a "policy maker" for the county, arguing that a District Attorney is an officer of the state and, thus, incapable of being a policy maker for Ector County. *Id.* The Fifth Circuit rejected this contention finding that Ector County's District Attorney was a policy maker and was exercising official policy when he made the decision to terminate the Petitioner's employment in that case. *Id.* The Court went on to find that the district attorney's office is limited to exercising its powers in Ector County, it is elected by Ector County voters and it is supported by Ector County funds. "In sum, although the office (like Ector County itself) is a creation of the state, all of its functioning is county-based." *Id.* The Fifth Circuit in *Davis* also distinguished *Echols v. Parker* (discussed *infra.*) in holding that an elected District Attorney is a final policy maker for a Texas county. The Fifth Circuit found that no question of the district attorney as a policy maker was presented in *Echols*. *Id.* at n.34.

> Instead, the case at hand bears a stronger resemblance to *Van Ooteghem v. Gray*, 584 F. Supp. 897 (S. D. Tex. 1984), aff'd, 774 F.2d 1332 (5th Cir. 1985). In *Gray*, we affirmed the district court judgment that the district attorney derives his policy making authority from the electorate and "need not

> be connected to a council or other governing body." *Id.* at 898. As an elected official who represents the final authority in his office, his "action must necessarily be considered to represent official policy." *Id.*; cf. *Turner v. Upton County, Texas*, 915 F.2d 133 (5th Cir. 1990), cert. denied, 498 U.S. 1069, 111 S. Ct. 788, 112 L. Ed. 2d 850 (1991) ("Because of the unique structure of county governments in Texas . . . elected county officials . . . hold virtually absolute sway over the particular tasks or areas of responsibility entrusted to him by state statute and is accountable to no one other than the voters for his conduct therein." (quoting *Familias Unidas v. Briscoe*, 619 F.2d 391, 404 (5th Cir. 1980)).

Id. at n.34. *See also Mairena v. Foti*, 816 F.2d 1061, 1065 (5th Cir. 1987), *cert. denied*, 484 U.S. 1005 (1988) (finding that district attorney's participation in the formulation of contested policy met the "policy or custom" requirement of *Monell* and upholding finding of municipal liability.)

Moreover, since Lyford was acting as the equivalent of the elected District Attorney for Upshur County, Texas (*see* discussion of Defendant Lyford's status as "district attorney pro tem" *infra*) a single decision or course of action on his part is sufficient to establish governmental liability under § 1983. *See Bennett v. Pippen*, 74 F.3d 578, 586 (5th Cir.), *cert. denied*, 519 U.S. 817 (1996).

> Our cases make clear that under *Monell*, "a single decision may create municipal liability if that decision was made by a final policymaker responsible for that activity." *Brown v. Bryan*

> *County, Oklahoma*, 67 F.3d 1174, 1183 (5th Cir. 1995) (emphasis in original); *See also City of St. Louis v. Praprotnik*, 485 U.S. at 124-125; *Turner v. Upton County, Texas*, 915 F.2d at 136-137 (5th Cir. 1990), cert. denied, 498 U.S. 1069 (1991). When a final policy maker makes the relevant decision, and when that decision is within the sphere of the policy maker's final authority, "the existence of a well-established, officially-adopted policy will not insulate the municipality from liability." *Gonzalez v. Ysleta Independent School District*, 996 F.2d 745, 754 (5th Cir. 1993). State law determines whether a particular individual is a county or municipality final decision maker with respect to a certain sphere of activity. *Praprotnik*, 485 U.S. at 124; *Jett v. Dallas Independent School District*, 491 U.S. 701, 737 (1989); *Doe v. Rains County Independent School District*, 66 F.3d 1402, 1407 (5th Cir. 1995).

Id. As a consequence, it is not required that a § 1983 Petitioner plead or prove a widespread practice, policy or custom of unconstitutional practices in order to hold a county government liable under *Monell*. It is sufficient if the Petitioner proves that even a single decision of a county's final policy maker (which specifically includes an elected District Attorney) caused a constitutional violation in order to impose municipal liability under *Monell* and its progeny.

Summarizing this authority, in order to prevail under § 1983 against a local government entity, a Petitioner must allege facts showing that he has suffered a violation of his constitutional rights and such violation was caused by the

municipality's adoption or failure to adopt a particular policy. That policy may be in the form of a policy statement or ordinance officially adopted or promulgated by the municipality's law making body, a custom or practice so widespread as to constitute a de facto policy or a single decision by a municipal official with final policy making authority. *See Monell, Praprotnik, Pembaur, supra.* A municipality may not be held liable solely for the actions of its non-policy making employees where no policy is alleged to have caused the violation. Rather, a Petitioner must show that the execution of a municipality's policies or customs led to the constitutional violation. *Colle v. Brazos Cty. Tex.*, 981 F.2d at 244. In this case Petitioner brought forward sufficient summary judgment evidence to establish municipal liability under this controlling law against Respondent Upshur County, Texas.

II.

RESPONDENT LYFORD HAD FINAL POLICY MAKING AUTHORITY FOR RESPONDENT UPSHUR COUNTY, TEXAS WITH RESPECT TO THE INVESTIGATION, ARREST AND INDICTMENT OF PETITIONER

Upshur County, Texas's defense to Petitioners' § 1983 claims, both in the trial court and on appeal, was that Lyford was acting as an officer of the State of Texas and not as an officer of Upshur County, Texas during all relevant time periods. Upshur County's entire argument in this regard was premised upon the Fifth Circuit's holding in *Esteves v. Brock*, 106 F.3d 674 (5th Cir. 1997). The Fifth Circuit erroneously accepted this argument and improperly affirmed the dismissal of Petitioners' § 1983 claims against Respondent Upshur County, Texas on the authority of *Esteves v. Brock.*

The argument Upshur County made to the trial court and the Fifth Circuit was first answered by the Fifth Circuit in 1985 in *Crane v. Texas*, 766 F.2d 193 (5th Cir. 1985). In that case, Dallas County had advanced the following contention:

> [A] Texas district attorney is an officer of the State of Texas, not of the county in which he serves, and hence Dallas County is not responsible for the policies which its District Attorney sets for it.

Id. at 194. First off, the panel noted that a Texas district attorney has numerous, *if relatively minor*, attributes of a State official. *Id.* (emphasis supplied). However, "[o]ther and more significant factors, generally speaking, argue that he is a local official." *Id.* at 195.

> He is elected by the voters of his district usually one county. Tex. Const. art. V, §21. His major powers and duties — which concern the prosecution of serious crimes and which he exercises alone and without responsibility to the State Attorney General, who has no general prosecutorial powers — are limited to the territory of his district. He is paid by county funds, although these are partly reimbursed by the state. And the significance of the creation of his office by the State Constitution is diminished by the circumstances that other local offices are created by it as well. *See* e. g. Article V, §19 (Justices of the peace) and §20 (County clerks). In sum, much like the county itself, his office is a local entity, created by the State of Texas and deriving its powers from those of the State, but limited in the

> exercise of those powers to the county, filled by its voters, and paid for with its funds . . .
>
> For present purposes, then, we conclude that he is properly viewed as a county official, elected by its voters and responsible for its relevant policy. In such circumstances, we see no injustice in holding the County responsible for his actions of this sort. Doubtless he is also in some senses and officer of the State as least as ultimately deriving the powers of his office from that source. But even were he a State official in every sense, called so in State law and designated by the State to make policy for its other creature, the county, our answer would likely remain the same; county responsibility for violation of the Constitution cannot be evaded by such ingenious arrangements.

Id. In so holding, the Fifth Circuit determined that Dallas County was responsible for the acts of Henry Wade, its elected District Attorney.

This question was next discussed in *Echols v. Parker*, 909 F.2d 795 (5th Cir. 1990). There the Fifth Circuit held that a Mississippi county attorney charged with violating a Petitioner's constitutional rights in the course of enforcing the laws of the State of Mississippi was a state official and not a county official.

> A county official pursues his duties as a state agent when he is enforcing state law or policy. He acts as a county agent when he is enforcing county law or policy. *It may be possible for the*

> *officer to wear both state and county hats at the same time* . . . but when a state statute directs the action of an officer, as here, the officer, be he state or local, is acting as a state official.

Id. at 801 (emphasis supplied). This holding was further refined in *Krueger v. Reimer*, 66 F.2d 75 (5th Cir. 1995). In that case the Petitioner contended in a pro se § 1983 lawsuit that the Comal County Texas District Attorney (Reimer) and state district judge violated his constitutional rights in conspiring to deny his right to appeal a criminal conviction by not allowing him to proceed in forma pauperis and by denying his right to self-representation. The Petitioner alleged that Comal County was liable because Reimer acted as a final policy-maker for the county. *Id.* at 76.

In rejecting the Petitioner's contention in *Krueger*, the Fifth Circuit initially observed that Krueger's claims against Reimer concerned his actions during Krueger's criminal trial and, therefore, are covered by the doctrine of prosecutorial immunity. *Id.* at 77. As to Petitioner's contention that Comal County was liable because Reimer acted as a final policy-maker for the county, the court first pointed out that a county may be liable for the conduct of its district attorney if he exceeds the scope of his prosecutorial duties; citing *Turner v. Upton County*, 915 F.2d 133, 137-38 (5th Cir. 1990). However, Krueger made no specific factual allegations that Reimer acted outside the scope of his prosecutorial functions. *Krueger*, 66 F.3d at 77. Due to this, the Fifth Circuit held that since Reimer was acting in his official capacity in Krueger's criminal trial, his actions did not constitute the official policy of Comal County. *Id.*

These precedents lead up to the Fifth Circuit's decision in *Esteves v. Brock*. In *Esteves*, the Petitioner filed a pro se § 1983 claim against Harris County and one of its assistant district attorneys (Brock). The Petitioner contended that Brock violated his right to equal protection of the law by using peremptory challenges to exclude blacks from a jury which convicted him of aggravated robbery. In denying the Petitioner's claims, the Fifth Circuit determined that "[a]ll of Brock's actions of which Esteves complained occurred during Esteves' criminal trial" and, as such, "[b]ecause Brock's use of peremptory strikes in a racially discriminatory manner was part of her presentation of the state's case, she is entitled to absolute immunity from personal liability". *Esteves*, 106 F.3d at 677.

As to the liability of Harris County, the Fifth Circuit held that the acts of Brock in exercising peremptory challenges in a racially discriminatory manner were not fairly attributable to the county because they were actions taken, not by county officers, but by agents of the state acting as advocates as part of the prosecutorial function. In so holding, the Fifth Circuit found that whether an individual defendant is acting on behalf of the state or the local government is determined by the state law and by an analysis of the duties alleged to have caused the constitutional violation. *Id.* Here it was determined that Texas law provides that a district attorney is an agent of the state, not of the county in which the criminal case happens to be prosecuted, where the district attorney acts in a prosecutorial capacity to enforce state penal law. *Id.* at 678. However, in so holding, the Fifth Circuit observed that its decision in this regard did "not absolve a county of all responsibility for the actions of a district attorney in the performance of his or her duties. For those duties that are administrative or managerial in

nature, the county may be held liable for the actions of a district attorney who functions as a final policy-maker for the county". *Id.* citing *Familias Unidas v. Briscoe*, 619 F.2d 391 (5th Cir. 1980). *Esteves* specifically makes it clear that there are certain non-prosecutorial acts by a district attorney which can impose *Monell* liability upon a county.

In this case, due to this Court's holdings in *Imbler v. Pachtman*, 424 U.S. 409 (1976) and *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993), Petitioner was careful to detail in his pleadings and summary judgment proof the unconstitutional actions of Lyford (and Baggs and Fleig) that occurred during the investigatory stage of the proceedings against Petitioner. Lyford does not have absolute immunity for constitutional violations that occur while he is acting in an investigatory (as opposed to prosecutorial) capacity. It can be argued that a Texas county would not have *Monell* liability for the acts of its district attorney that are protected by absolute immunity. This is essentially the holdings of *Reimer* and *Esteves*. On the other hand, these cases can be fairly interpreted to mean that a Texas county can have *Monell* liability for the acts of its district attorney that occur while he is performing an investigatory, administrative or managerial function instead of a prosecutorial function. In this case, Petitioner provided summary judgment evidence that Lyford violated Petitioner's constitutional rights while acting in his capacity as an investigator. As such, Fifth Circuit precedent, specifically *Esteves*, clearly establishes that Upshur County can suffer *Monell* liability for the acts of Lyford, its District Attorney Pro Tem for Petitioner's case.

As a subsidiary point, Upshur County also claimed that Lyford was purely a state actor because he was not the elected District Attorney for Upshur County, Texas but was only

appointed by the state district judge to perform prosecutorial duties. This argument is also unavailing. In this case, the elected Upshur County District Attorney, Tim Cone, recused himself from any criminal matters pertaining to the Kerr family. In fact, Cone's recusal prompted the need for the state district judge's appointment of Lyford as district attorney pro tem to handle these cases. An "attorney pro tem" is appointed by a Texas district court in accordance with statutory provisions. *See* Tex. Code Crim. Proc. Ann. art. 2.07, *et seq*. Specifically, article 2.07(b-l) allows the district attorney to recuse himself from a case if necessary. Upon approval of the recusal request by the judge, the district attorney is considered disqualified. Art. 2.07(b-l). Article 2.07(a) provides that if the attorney for the state is disqualified , a judge "may appoint any competent attorney to perform the duties of the office during the absence or disqualification of the attorney for the state". Art. 2.07(b-l). Article 2.07(a) states plainly that the pro tem attorney will perform the duties of the district attorney. *State v. Rosenbaum*, 852 S.W. 2d 525, 527 (Tex. Crim. App. 1993).

> In addition, over 120 years ago the Texas Supreme Court (then vested with general authority over criminal matters) held that "an attorney pro tem appointed by the court has all powers and duties of the regular prosecuting attorney". *State v. Lackey*, 35 Tex. 357 (1872). Thus, if a district attorney is disqualified, the court may appoint any competent attorney to assume all the district attorney's duties and powers during his disqualification.
>
> In this case the trial judge followed Article 2.07 by appointing James to perform the duties of

> Charles J. Sebesta, Jr., the disqualified district attorney. By his request to be disqualified, the district attorney manifested his intention to give his full power and authority to the special prosecutor in this case.
>
> As previously discussed, an attorney pro tem or special prosecutor[1] takes the place of the disqualified district attorney assuming all the district attorney's powers and duties in the case. *Therefore, the special prosecutor is not subject to the direction of the disqualified district attorney as is a subordinate, but, for that case, he is the district attorney.*

Id. at 527-28 (emphasis supplied). Or, as succinctly stated by Judge Sam Houston Clinton in his concurring opinion,

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1. The term "special prosecutor" (who works with the office-holder) is commonly used in an expansive and often improper manner by the bench and bar when reference should be to "attorney pro tem" (who replaces the office-holder) as contemplated by article 2.07. *See State v. Rosenbaum*, 852 S.W.2d at 529-30 (Clinton, J., concurring). A "special prosecutor", with the consent of the district attorney, assists the district attorney in the prosecution of a particular case, but the district attorney is responsible for the prosecution, control and management of the case. *See Rosenbaum*, 852 S.W.2d at 529; *Rogers v. State*, 956 S.W.2d 624, 625 n.1 (Tex. App. -- Texarkana 1997, pet. ref'd). The "special prosecutor" need not be appointed by the trial court and is not required to take the constitutional oath of office where he acts with the permission of the district attorney. *See Rosenbaum*, 852 S.W.2d at 529 n.2; *Lopez v. State*, 503 S.W.2d 775, 776 (Tex. Crim. App. 1968). The utilization of a special prosecutor is not predicted upon the absence or disqualification of the elected district attorney. *See Davis v. State*, 840 S.W.2d 480, 487 (Tex. App. – Tyler 1992, pet. ref'd).

"[b]asically, a district attorney pro tem is appointed by the district court, and after taking the oath of office assumes those duties of the elected district attorney and in effect replaces the latter in performing germane functions of the office for purposes contemplated by the appointment." *Id.* at 529 (Clinton, J., concurring).

As such, Texas statutory and decisional law establishes that Lyford was not acting as a mere assistant to Tim Cone, nor as his subordinate, but that for Petitioner's case, Lyford was clothed with the full powers and duties of the elected District Attorney for Upshur County, Texas and was acting in such capacity at all relevant times that he engaged in the violations of Petitioner's constitutional rights. Accordingly, the Fifth Circuit's holding that Upshur County cannot be responsible for the acts of Respondent Lyford or that Lyford could not have been a county officer because he was appointed by the state district judge to perform prosecutorial functions, as opposed to being the elected District Attorney for Upshur County was clearly and unambiguously erroneous and directly contrary to the pronouncements of this Court in *Monell*, *Praprotnik*, *Pembaur* and *Buckley*.

CONCLUSION

For the foregoing reasons a petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED AND FILED FEBRUARY 20, 2001

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-41297

JAMES YORK BROWN,

Plaintiff-Appellant,

versus

ROLAND SCOTT LYFORD; ET AL.,

Defendants,

ROLAND SCOTT LYFORD; ANN GOAR; DEBBIE MINSHEW; BROOKS FLEIG; STEVE BAGGS; UPSHUR COUNTY, TEXAS,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Texas

Before KING, Chief Judge, and HIGGINBOTHAM and DUHÉ, Circuit Judges.

Appendix A

PATRICK E. HIGGINBOTHAM, Circuit Judge:

This is an appeal from a judgment of the district court granting summary judgment to various defendants in a section 1983 lawsuit. This suit arose from an aborted criminal investigation of child abuse and murder, presenting claims against arresting officials including malicious prosecution and false arrest. We hold that the officer defendants were entitled to qualified immunity, and that none was a policymaking official for the county defendant. We AFFIRM the judgment of the district court.

I

In 1990, Ann Goar and Debbie Minshew as employees of the Texas Department of Protective and Regulatory Services were assigned to counsel the children of Loretta and Wendell Kerr. The Kerr children came into foster care upon allegations of sexual abuse leveled against Wendell Kerr. The counseling later expanded to include the children of Wanda Geer Hicks, whom Wendell Kerr had started dating. The Kerr and Hicks children began to tell of being tortured, molested, and sodomized by their parents, grandparents, and various strangers, abuse including satanic rituals involving masks and knives. Their stories related the murder, dismemberment, post-mortem rape, and cannibalism of babies and children by the abusing adults. Goar and Minshew recruited two private occult investigators, Brooks Fleig and Steve Baggs to assist in an investigation of these accounts by the children. Roland Scott Lyford was appointed prosecutor pro tem after Upshur County's regular district attorney recused himself from the case. Lyford participated

closely in the investigation, and in 1993 at Lyford's recommendation the county hired Fleig and Baggs as criminal investigators.

Child Protective Services criticized the methods of the investigators in interviewing the Kerr and Hicks children. CPS particularly criticized the use of a "holding technique," in which investigators physically restrained children while they answered questions. CPS also objected to the suggestive nature of the questions asked by the investigators. Suggestive questions were asked of both the children and the adult witnesses. An adult, Wanda Hicks,[1] later recanted, explaining that she developed her story out of the questions investigators put to her. Despite a grand jury indictment, all charges were ultimately dropped. Wendell Kerr had a corroborated alibi for the times of the alleged crimes, and the mishandling of the child witnesses made their testimony unreliable.

Yet, evidence also pointed in the opposite direction. Medical examination of the children found genital and anal scarring consistent with sexual molestation. An adult, Lucas Geer, confessed to police that he participated in ritualistic child abuse and child murder, a confession corroborating the stories told by the Kerr and Hicks children. A search of the Kerr property found three shallow grave-like depressions in the soil, a shovel with blood residue on it, an area matching the children's description of where the abuses occurred, two devil masks, a blood-stained mattress cover, and four knives said by the children to have been used to murder and dismember children. Pursuant to a plea agreement, two of

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1. Then named Wanda Kerr due to her marriage.

the charged adults identified items retrieved from the Kerr household as devices used to restrain and torture children. Finally, plastic bags were found buried on the Kerr property, containing bone fragments. Before Lyford took his evidence to the grand jury, the Texas Human Skeletal Identification Laboratory issued a report stating the remains were most probably human. Another report from a different laboratory, filed months after the indictment was issued, concluded that the remains were not human.

While the defendants were investigating the Kerr case, Sergeant James Brown was investigating the disappearance of Kelly Wilson. Wilson was 17 when she was reported missing in Gilmer, Texas. In 1993, one of the Kerr children, identified as "R.S.," claimed that Kelly Wilson had been abducted, raped, and murdered by the Kerrs. As a result, Brown's investigation began to overlap with the investigation being conducted by defendants.

In a conversation between Brown and defendants, Brown said he had separately investigated the Kerr and Hicks children's allegations, and observed that Wendell Kerr, a key suspect, was not in Texas when Kelly Wilson disappeared. Brown asserts that defendants viewed his comments as interfering with their investigation. Lyford told Brown that Lyford was now investigating the disappearance of Kelly Wilson, that he did not want Brown interfering, and that if Brown interfered, "we're going to have a problem."

Shortly thereafter, R.S. implicated Brown in the charges of child abuse and the disappearance of Kelly Wilson. He

stated that the police would not help, that they were also "bad," and described in general terms a person resembling Brown as having participated in the abuse. Later, Connie Martin — one of the adults involved — also implicated Brown by name. At the same time, the case against Brown had problems. Wanda Kerr was unable to identify Brown in a photo lineup. The narratives told by witnesses other than R.S. never mentioned Brown.

Lyford took this evidence to the Upshur County Grand Jury, which indicted the alleged abusers, including Brown. Brown was arrested and spent six days in jail. As we explained, charges were later dropped. Considerable media coverage surrounded these events. The Kerrs sued under section 1983. The district court dismissed on immunity grounds. We affirmed in *Kerr v. Lyford.*[2] This case concerns largely the same events, but is Brown's lawsuit rather than the Kerrs's. In his original complaint, Brown asserted a broad range of constitutional violations,[3] as well as a variety of state law claims.[4] In rendering judgment, the district court

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2. 171 F.3d 330 (5th Cir. 1999).

3. Specifically, Brown claimed to have been deprived of the right not to be falsely accused of capital murder, the right not to be falsely arrested, the right not to be subjected to unlawful searches and seizures, the right not to be deprived of liberty without due process of law, the right not to be deprived of property without due process of law, the right of equal protection of law, and the right of privacy.

4. Those were malicious prosecution, intentional infliction of emotional distress, negligence, gross negligence, and civil conspiracy.

read Brown's complaint to invoke federal constitutional rights to be free from unreasonable seizure, false arrest, false imprisonment, and malicious prosecution, a reading Brown does not challenge. The district court held that Goar, Minshew, Fleig, and Baggs were entitled to qualified immunity, Lyford to absolute immunity, and all were entitled to summary judgment. It granted summary judgment to Upshur County. Brown appeals.

II

To overcome the qualified immunity of government officials, Brown must show 1) a constitutional violation; 2) of a right clearly established at the time the violation occurred; and 3) that the defendant actually engaged in conduct that violated the clearly established right.[5]

To date, the Fifth Circuit accepts that malicious prosecution can deprive a person of constitutional rights. This "constitutional tort" has seven elements:

1. criminal action commenced against the plaintiffs;

2. that the prosecution was caused by the defendants or with their aid;

3. that the action terminated in the plaintiffs' favor;

4. that the plaintiffs were innocent;

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5. *Kerr*, 171 F.3d at 339.

5. that the defendants acted without probable cause;

6. that the defendants acted with malice; and

7. that the criminal proceeding damaged the plaintiffs.[6]

The "constitutional torts" of false arrest, unreasonable seizure, and false imprisonment also require a showing of no probable cause.[7]

These defendants have qualified immunity if they had probable cause to believe that Brown committed a crime. "For purposes of malicious prosecution, probable cause means 'the existence of such facts and circumstances as would excite the belief, in a reasonable mind, acting on the facts within the knowledge of the prosecutor, that the person charged was guilty of the crime for which he was prosecuted.' "[8]

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6. *Kerr*, 171 F.3d at 340.

7. *See, e.g.*, *Mendenhall v. Riser*, 213 F.3d 226, 230 (5th Cir. 2000) (holding that qualified immunity protects government officials from a charge of wrongful arrest where a reasonable official would believe probable cause was present); *Thomas v. Kippermann*, 846 F.2d 1009, 1011 (5th Cir. 1988) ("Claims of false arrest, false imprisonment, and malicious prosecution involve the guarantees of the fourth and fourteenth amendments when the individual complains of an arrest, detention, and prosecution without probable cause.").

8. *Kerr*, 171 F.3d at 340 (quoting *Moore v. McDonald*, 30 F.3d 616, 620 n.2 (5th Cir. 1994)).

Appendix A

Brown points to the statements of three witnesses in the summary judgment record as establishing the absence of probable cause. First, Shane Phelps, the assistant Attorney General who took over from Lyford, stated in an affidavit that "the evidence supporting the indictment of Sgt. Brown was fatally deficient and did not even rise to the level of probable cause." Second, Dr. Richard Ault, an expert retained by Brown, expressed in an affidavit his opinion that the methods used in interviewing the various witnesses were excessively coercive, such that the statements of those witness could not "produce objective information that a reasonable law enforcement officer could use in the course of" an investigation. Third, Dr. Bruce Perry, an expert testifying as part of a later grand jury investigation reviewing Lyford's investigation, said that both the adult and child witnesses came from abusive homes and were therefore prone to reading a questioner's face and saying what they thought the questioner wanted to hear, in order to protect themselves from abuse. Perry also expressed his opinion that the interviewing techniques used were highly coercive and suggestive.

A plaintiff must clear a significant hurdle to defeat qualified immunity. "[T]here must not even 'arguably' be probable cause for the search and arrest for immunity to be lost."[9] That is, if a reasonable officer could have concluded that there was probable cause upon the facts then available

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9. *Hart v. O'Brien*, 127 F.3d 424, 444 (5th Cir. 1997). *Hart* was abrogated by the Supreme Court's decision in *Kalina v. Fletcher*, 522 U.S. 118 (1997), but upon a different issue. *Kalina* extended the time during which a prosecutor is absolutely immunized beyond the time recognized in *Hart*.

to him, qualified immunity will apply. Defendants point to the following evidence that, at least arguably, established probable cause to arrest Brown. First, R.S. implicated Brown in the disappearance of Kelly Wilson. Second, Paulette Kerr stated she was afraid of Brown and that Brown had been dating Kelly Wilson. Third, Connie Martin implicated Brown in the disappearance of Kelly Wilson and the abuse of the Kerr children. Fourth, these witnesses were credible because their stories were consistent with one another and because physical evidence from the bodies of the Kerr children and the Kerr property tended to support their stories. Fifth, Brown's investigation of the Wilson disappearance contained suspicious irregularities.

We cannot say that the testimony of several eyewitnesses, corroborated in some aspects by physical evidence, did not even arguably create probable cause. Qualified immunity "gives ample room for mistaken judgements," by protecting "all but the plainly incompetent or those who knowingly violate the law."[10] That is the balance that courts have struck between compensating wronged individuals for deprivation of constitutional rights and frustrating officials in discharging their duties for fear of personal liability.[11] While Doctors Ault and Perry raise doubts as to the credibility of the witnesses in this case, we cannot say that all reasonable officers should have seen in these witnesses the psychological tendency to confabulate that Ault and Perry saw, nor can we say that all reasonable

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10. *See Mendenhall v. Riser*, 213 F.3d 226, 230 (5th Cir. 2000) (quoting *Malley v. Briggs*, 475 U.S. 335, 343 (1986)).

11. *See Shipp v. McMahon*, 234 F.3d 907, 915 (5th Cir. 2000).

officers should have understood these interviews to be so coercive that the matter should not have been taken to a grand jury. This is especially true where, as here, aspects of those statements were corroborated by physical evidence. We agree with the district court that defendants Goar, Minshew, Fleig, and Baggs are entitled to qualified immunity.

III

The district court granted Lyford summary judgment on the grounds that he was absolutely immune from suit as a prosecutor. Brown contests this reasoning, arguing that Lyford engaged in actionable investigative activities before donning his "prosecutor's hat." The circuits are divided on the proper approach to this situation.[12] We need not confront that dispute in this case. The judgment of the district court should be affirmed if Lyford was, like the other defendants and as he urges to us also, entitled to qualified immunity.[13]

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12. *Compare Buckley v. Fitzsimmons*, 20 F.3d 789, 796 (7th Cir. 1994) (holding that merely collecting false evidence is not independently actionable, and the use of such evidence is protected by absolute immunity), *with Zahrey v. Coffey*, 221 F.3d 342, 349-55 (2d Cir. 2000) (holding that where the same prosecutor collects false information and uses it to procure an indictment, the indictment cannot sever the causal chain and protect the prosecutor from liability for his investigatory acts).

13. *See United States v. Real Property Located at 14301 Gateway Blvd. West, El Paso County, Texas*, 123 F.3d 312, 313 (5th Cir. 1997) ("It is well-settled, however, that we will not reverse a judgment of the district court if it can be affirmed on any ground, regardless of whether the district court articulated the ground.").

Appendix A

We may properly determine whether Lyford is entitled to qualified immunity.[14] When faced with similar situations, we have remanded to the district court for a determination of qualified immunity.[15] In this case, however, we have the benefit of the district court's determinations as to defendants Goar, Minshew, Fleig, and Baggs, and the accusations against Lyford track the accusations against those four defendants. Since qualified immunity is immunity not only from damages but also from suit itself, it is to be determined as early as possible.[16] It makes little sense to remand this issue to the district court, because the outcome is foreordained. The district court has already held that Goar, Minshew, Fleig, and Baggs are entitled to qualified immunity.

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14. *See Buckley*, 20 F.3d at 793 ("Although qualified immunity is an affirmative defense . . . no principle forbids a court to notice that such a defense exists, is bound to be raised, and is certain to succeed when raised. So much is established for res judicata and the statute of limitations, two other affirmative defenses. . . . Defendants inform us that they want the benefit of qualified immunity. Because this is a legal defense, we would not defer to the district court's resolution. Courts should resolve immunity issues at the earliest possible time, preferably before allowing discovery. . . . That time is now.").

15. *See Galvan v. Garmon*, 710 F.2d 214, 215 (5th Cir. 1983) (holding that a probation officer was not entitled to absolute immunity, and remanding for consideration of qualified immunity); *Ryland v. Shapiro*, 708 F.2d 967, 975-76 (5th Cir. 1983) (holding that charges made against prosecutors were outside the scope of their prosecutorial role and absolute immunity therefore did not apply; remanding for consideration of qualified immunity).

16. *See Gibson v. Rich*, 44 F.3d 274, 277 (5th Cir. 1995); *Spann v. Rainey*, 987 F.2d 1110, 1114 (5th Cir. 1993).

As to his conduct before the grand jury, Lyford was entitled to absolute immunity. As to his investigatory conduct leading to the grand jury, he was entitled to the same qualified immunity that protects Goar, Minshew, Flieg, and Baggs. Lyford is situated similarly to Goar, Minshew, Flieg, and Baggs, except that he was the person who brought the case before the grand jury — an act for which he receives absolute immunity. Lyford was therefore entitled to qualified immunity for his investigative acts. Accordingly, the judgment of the district court as to Lyford is AFFIRMED.

IV

Plaintiff also sued Upshur County, seeking to hold it liable for the conduct of Fleig and Lyford. Under *Monell v. Department of Social Services*,[17] a county cannot be held liable under section 1983 on a theory of respondeat superior, but it can be held liable when conduct depriving a person of constitutional rights was pursuant to county policy. Brown does not contend that, apart from the role of Lyford, Upshur County had a policy of charging and arresting innocent people. Rather he urges that Lyford acted as a policymaking official. We disagree, and hold Lyford was not a policy-making official for Upshur County.[18]

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17. 436 U.S. 658, 694 (1978).

18. The district court held that because Fleig and Lyford were immune, Upshur County was also not subject to suit, citing *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986). *Heller*, however, held only that if no claim is stated against officials — if plaintiff does not show any violation of his constitutional rights — then there

(Cont'd)

Appendix A

Brown argues that the elected district attorney is a policymaking official and Lyford as prosecutor pro tem in this case held all the rights and duties of the elected district attorney.[19] Brown concedes that under *Esteves v. Brock*,[20] Lyford was not a policymaking official for Upshur County when he was acting in his prosecutorial capacity, because then he was enforcing state rather than county law. Brown seeks to invoke the exception in *Esteves*, permitting *Monell* liability for those duties of a prosecutor that are administrative or managerial in nature. Brown misunderstands the holding of *Esteves*.

Esteves is clear that a county may only be held liable for acts of a district attorney when he "functions as a final policymaker for the county."[21] Thus, for example, a district attorney with the final word on hiring or firing within the district attorney's office sets county policy regarding those decisions. That can then support *Monell* liability for the

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(Cont'd)
exists no liability to pass through to the county. When, however, a plaintiff states a claim but the official is protected by qualified immunity, that defense protects only the individual officer, not the municipality. *See, e.g.*, *Babb v. Dorman*, 33 F.3d 472, 475 n.5 (5th Cir. 1994). Accordingly, we must reach the question of whether Lyford was a policymaking official for Upshur County.

19. Brown does not argue that Fleig was a policymaking official for Upshur County, and we put him aside.

20. 106 F.3d 674 (5th Cir. 1997).

21. 106 F.3d at 678.

county. Here, however, Brown has made no showing that Lyford in some way beyond his role as a prosecutor pro tem functioned as the final policymaking authority for Upshur County in the investigation of the Kerr and Hicks children's claims. Upshur County officials have testified that he did not, and there is no contrary evidence. The sole basis for the contention that Lyford set county policy in his investigative work was his status as prosecutor pro tem. But Lyford as prosecutor pro tem stepped only into the shoes of the elected district attorney for purposes of the case he was appointed to handle. He did not assume general management of the array of cases in that office. He was a one case prosecutor. While Lyford's authority over his one case was considerable, his charge was too limited to make him a policymaking authority for the county. His limited charge is made plain by the fact that he could not hire or fire for Upshur County. Indeed he could not hire Brooks and Flieg. He could only recommend that the County do so.

Brown has presented no evidence that Lyford had or exercised sufficient policymaking authority for Upshur County to warrant the imposition of *Monell* liability. The district court did not err in granting summary judgment to Upshur County.

V

The judgment of the district court is AFFIRMED.

APPENDIX B — ORDER ON DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT AND FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS, TYLER DIVISION DATED AND FILED SEPTEMBER 29, 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

CIVIL ACTION NO. 6:94cv491

JAMES YORK BROWN

v.

ROLAND SCOTT LYFORD, ET AL.

ORDER ON DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

On July 5, 1994, the Plaintiff, James York Brown, filed the above-styled civil rights lawsuit against Roland Lyford, Mills, Shirley, Eckel & Bassett, LLP, Ann Goar, Debbie Minshew, Texas Department of Protective and Regulatory Services, Brooks Fleig, and Steve Baggs pursuant to 42 U.S.C. § 1983. The Plaintiff's claim against the Texas Department of Protective and Regulatory Services was dismissed on December 12, 1994. On June 27, 1996, the complaint was amended to add Upshur County, Texas, as a defendant. The claim against Defendant Mills, Shirley, Eckel & Bassett, LLP, was dismissed on July 1, 1999. Accordingly, the remaining defendants are Lyford, Goar, Minshew, Fleig, Baggs and Upshur County, Texas. Each of the remaining

defendants filed a motion for summary judgment. All of the parties have consented to disposition of the case by a United States Magistrate Judge pursuant to 28 U.S.C. § 636(c).

Background

This civil rights lawsuit stems from the indictment, arrest and imprisonment of the Plaintiff, James York Brown, for the kidnaping, rape and murder of Kelly Wilson. The individual defendants were involved in the investigation and prosecution leading to the Plaintiff's arrest. Lyford asserts the defense of absolute, prosecutorial immunity, while Goar, Minshew, Fleig and Baggs each assert the defense of qualified immunity. There are four motions for summary judgment currently pending: Motion for Summary Judgment of Defendant, Brooks Fleig (docket #244), Defendants Goar, Minshew, and Baggs' Motion for Summary Judgment (docket #251), Defendant Roland Scott Lyford's Motion for Summary Judgment (docket #278) and Defendant Upshur County's Motion for Summary Judgment (docket #266 and 275).

Goar began working as a caseworker for the Texas Department Human Services/Texas Department of Protective and Regulatory Services (hereinafter "THS") in October of 1990. Approximately one month later, Goar was assigned to work on the case of Loretta and Wendell Kerr and their four children (hereinafter "the Kerr children"). The children were living in foster homes due to allegations that Wendell Kerr was sexually abusing them. Goar made monthly visits with the children.

Appendix B

Wendell Kerr divorced Loretta and subsequently married Wanda Geer Hicks. Wanda Geer Hicks has five sons (hereinafter "the Hicks children"). Goar was assigned to counsel Wanda Geer Hicks and her boys due to the apparent sexual abuse of one of the boys by Wanda's brother, Lucas Geer. In May of 1991, Wendell Kerr was indicted for sexually abusing one of his daughters. Approximately two months later, THS discovered that Wendell Kerr had married Wanda Geer Hicks and immediately removed the Hicks children from their home.[1] The Hicks children were placed in three separate foster homes. Goar continued working with the children after they were placed in foster care. At that time, Minshew was working with the Bass therapeutic foster home. One of the Hicks children was placed in the Bass therapeutic foster home and, consequently, Minshew was assigned to work with that child. Over the next six to nine months, the remaining Hicks children were placed in the Bass therapeutic foster home. Sometime later, the boys were moved to the Lappes' foster home.

The Hicks children began telling their foster parents about rampant sexual abuse at the hands of Wanda Geer Hicks, Lucas Geer, Wendell Kerr, Eugene Kerr and Geneva Kerr.[2] In addition, they expressed fear that the devil would come and hurt them. The children subsequently repeated these allegations to Goar and Minshew both spontaneously

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1. The Hicks children were removed from the home of Wendell Kerr and Wander Geer Hicks on an emergency basis pending a show cause hearing to determine whether they should remain in foster care.

2. Eugene and Geneva Kerr are the parents of Wendell Kerr.

and during coercive questioning. The children told stories of their grandparents and other members of the family meeting in the woods behind their grandmother's house to worship the devil. They also began relaying stories of the murder and mutilation of babies, children and animals by members of the Kerr family as part of some sort of satanic cult activity. Subsequently, the Kerr children told Goar of sexual abuse and devil worship. At some point, two of the Hicks children told Goar that a friend, referred to as RS, was also sexually abused by Wendell Kerr. Subsequent physical examinations supported the children's assertions of sexual abuse. The District Attorney's office and the Upshur County Sheriff's Office were both notified of the children's various allegations.

There is some question concerning the interviewing techniques employed to elicit some of the children's allegations. Although many statements appear to have been volunteered by the children, at times information was obtained through a "holding technique," in which a child would be physically restrained until he answered questions. Dr. Perry, a psychiatrist and developmental neuropharmacologist who provided consultation at a much later stage of this case at the request of Child Protective Services, strongly criticizes and questions the credibility of this technique.[3]

In June of 1992, Steve Baggs, a Department of Public Safety ("DPS") investigator, became involved in the investigation of the children's allegations. Baggs was experienced in investigating cases involving ritualistic

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3. Dr. Perry was consulted after the Plaintiff and the Kerrs were indicted for Kelly Wilson's abduction, rape and murder.

behavior and occult practices. Brooks Fleig, an investigator with the Upshur County District Attorney's Office, assisted Baggs in the investigation.

As part of this investigation, Baggs interviewed Lucas Geer. Geer admitted sexually abusing children and he corroborated some of the stories told by the Hicks and Kerr children, including the stories of the murder of children by members of the Kerr family. Geer submitted to two polygraph examinations and the examiner concluded that Geer was being truthful when he testified about the killing of children on Eugene and Geneva Kerr's property.

In an attempt to locate human remains, two DPS pilots and Baggs flew over Eugene and Geneva Kerr's property using an infrared system to detect heat rays. Two possible sites were located. The District Attorney, Tim Cone, presented evidence to an Upshur County Grand Jury and obtained indictments against Eugene Kerr, Geneva Kerr, Wendell Kerr, Danny Kerr, Wanda Kerr, Loretta Kerr, Connie Martin,[4] Tammy Smith, Don Holeman[5] and Lee Flowers on May 24, 1993. A search warrant was subsequently obtained for a search of Eugene and Geneva Kerr's property. A trained cadaver dog was used during the search and the dog indicated three potential locations of human remains.

Approximately one month later, RS told Goar, Minshew and Barbara Bass that he knew what happened to a missing

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4. Connie Martin is the wife of Danny Kerr.

5. Tammy Smith is the mother of RS and Don Holeman is his step-father.

Gilmer teenager, Kelly Wilson, and he described to them her abduction, rape and murder. According to RS, his parents, Tammy Smith and Don Holeman were involved, as well as Eugene and Geneva Kerr and Wanda and Wendell Kerr. This information was revealed in a van. The Defendants assert that they took RS for a ride in the van to calm him down for a hearing.[6] The parties dispute whether the holding technique was applied to RS. On the one hand, the Defendants argue that RS simply volunteered the information and, on the other hand, the Plaintiff submits that RS was submitted to the so-called "holding technique." Goar notified her supervisor and Baggs of the information revealed by RS. After the child repeated the story of Kelly Wilson's abduction, rape and murder to his attorney ad litem, the information was relayed to the Plaintiff, James Brown. James Brown was a Sergeant in the Gilmer Police Department. Brown apparently interviewed Wendell Kerr and Lucas Geer. The Defendants complain that Brown did not interview RS.

Some time in July of 1993, RS told his foster mother, Bass, that the Plaintiff was involved in the disappearance of Kelly Wilson. Bass passed the information along to Minshew and Minshew then interviewed the child. RS told Minshew that the Plaintiff was friends with his stepfather, Holeman, and that the Plaintiff was involved in Kelly Wilson's abduction.

Around this same time, the Upshur County District Attorney, Tim Cone, determined that it was necessary to disqualify himself from the prosecution of the indictments

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6. The hearing was being conducted to consider whether RS would remain in foster care.

against the Kerr family members due to a conflict of interests. Accordingly, a search began for someone to prosecute the cases. Eventually, on October 14, 1993, Roland Scott Lyford was appointed as a special prosecutor pursuant to Tex. Code Crim. Proc. Ann. art. 2.07 (Vernon 1977). He was later appointed as an Assistant District Attorney pro tem by Cone for prosecuting the sexual abuse cases and any criminal or civil lawsuits arising out of any and all incidents related or connected thereto. Baggs and Fleig were appointed as special investigators for the Upshur County District Attorney's Office for the purpose of working on this investigation.

In December of 1993, Wanda Kerr was interviewed several times by Baggs and Fleig, with Lyford present for some of the questioning. She told them about sexual abuse within the Kerr family and of RS. Wanda Kerr corroborated the children's stories of the murder of children in the woods on Eugene and Geneva Kerr's property. In addition, she described the involvement of Eugene, Geneva, Wendell and Danny Kerr in the abduction, rape and murder of Kelly Wilson. She explained that Danny Kerr abducted Kelly Wilson as a birthday present for his mother, Geneva Kerr, and took her to the Kerr's property where she was raped and murdered. After she was murdered, Kelly Wilson's body was seemingly kept in a red shed behind Eugene and Geneva Kerr's home. Wanda Kerr accompanied Goar, Baggs and Fleig to trace the route taken by Danny Kerr when Kelly Wilson was abducted.

Subsequently, Lyford, Baggs and Fleig interviewed Danny Kerr's wife, Connie Martin. Connie Martin similarly described what happened to Kelly Wilson and she implicated

Eugene and Geneva Kerr. Apparently, the information provided by Wanda Kerr and Connie Martin was part of a plea agreement arranged by Lyford.

During a search of Danny Kerr's clothing and property, Baggs found devil masks and knives like those described by the children, videotapes and a machete. Connie Martin told Baggs and Fleig that Danny Kerr used the machete to dismember some of the victims. Connie Martin later submitted to a polygraph examination and the examiner determined that she was being truthful when she told about the abduction and rape of Kelly Wilson.

At the time of the Kelly Wilson abduction, Wendell Kerr worked for a trucking company as a driver. Apparently, he claimed that he was out-of-state working for the trucking company on the day that Kelly Wilson disappeared. Lyford obtained the trucking logs which supported Wendell Kerr's assertion that he was not in Texas on the day Kelly Wilson disappeared. Lyford, however, concluded that the documents must have been fabricated.

Apparently, there was friction between the Plaintiff and Lyford. At some point, Lyford told the Plaintiff that he did not want him "messing with [his] investigation of Kelly Wilson" and that they were going to have a problem if he did. Goar and Minshew were also critical of the Plaintiff for not supporting them or taking an active role in the investigation of the Kerrs with respect to the Kelly Wilson disappearance.

After the conclusion of Connie Martin's approximately fourth interview concerning the Kerr family sexual abuse

and Kelly Wilson, Connie Martin came back to the interview room and told Lyford and Baggs that the Plaintiff was involved in sexual acts with her sons and RS. In addition, she implicated the Plaintiff in Kelly Wilson's rape. She was interviewed again approximately one week later and again told Baggs about the Kerr's ritualistic practices described by the children. A subsequent search of Connie Martin's residence revealed boots that were alleged to have been Kelly Wilson's boots.

On January 21, 1994, Lyford appeared before the Upshur County Grand Jury and presented the evidence gathered regarding Kelly Wilson. Minshew and Baggs testified before the grand jury — Minshew about what RS told her and Baggs about the Plaintiff's involvement and occult practices. The grand jury returned indictments against the Kerrs and the Plaintiff for the kidnaping, rape and murder of Kelly Wilson.

On the day the indictment was issued, the Plaintiff was arrested and imprisoned. He remained in jail for six days until he made bail. The indictments understandably attracted a great deal of media attention. The prosecution was later taken over by the Texas Attorney General's office. The investigation of the matter and the interviewing techniques were heavily scrutinized. In the end, the charges against the Kerrs and the Plaintiff were dropped. It was determined that the Plaintiff was not involved in the disappearance of Kelly Wilson.

The Plaintiff filed this § 1983 lawsuit on July 5, 1994. The Plaintiff asserts that the actions of the Defendants leading up to his indictment and arrest were objectively unreasonable.

He further submits that the witnesses who alleged that he was involved in Kelly Wilson's disappearance did so as a result of the Defendants' being overzealous and inexperienced. The Plaintiff argues that the Defendants were "overpoweringly suggestive" when interviewing witnesses, they overlooked evidence contradicting their theories, and they failed to follow through on evidence that would exculpate him. As a result, the Plaintiff asserts that he was denied his constitutional right to be free from unreasonable seizure, malicious prosecution, false arrest and false imprisonment. He further claims that the Defendants formed a conspiracy to prove that Kelly Wilson's disappearance was the result of satanic cult activity. In addition, the Plaintiff asserts state law claims of malicious prosecution, intentional infliction of emotional distress, defamation, and civil conspiracy.

In a companion case styled *Kerr v. Lyford*, Civil Action No. 6:95cv914, Eugene and Geneva Kerr sued Lyford, Goar, Minshew, Baggs and Fleig asserting that they were wrongfully investigated, arrested and incarcerated for the kidnaping, rape and murder of Kelly Wilson. The case was dismissed after the Court granted summary judgment in favor of the Defendants. The dismissal was affirmed on appeal. *See Kerr v. Lyford, et al.*, 171 F.3d 330 (5th Cir. 1999).

On July 27, 1999, Upshur County, Texas, filed a Request for Judicial Notice of *Kerr v. Lyford*. The Plaintiff was subsequently ordered to file a supplemental response to the motions for summary judgment specifically addressing the Fifth Circuit's decision in *Kerr v. Lyford*. Plaintiff's Supplemental Response to Defendants' Motions for Summary Judgment Addressing the *Kerr v. Lyford* Decision was filed on September 27, 1999.

Appendix B

Summary Judgment Standard

Rule 56(c) of the FED. R. CIV. P. provides that the Court may only grant a motion for summary judgment when there is no genuine issue of material fact and the moving party is entitled to summary judgment as a matter of law. The party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion and identifying those portions of pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 2553 (1986). The moving party, however, "need not negate the elements of the nonmovant's case." *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc). The movant's burden is only to point out the absence of evidence supporting the nonmoving party's case. *Stults v. Conoco, Inc.*, 76 F.3d 651, 655 (5th Cir. 1996). Once, the moving party makes a properly supported motion for summary judgment, the nonmoving party must look beyond the pleadings and designate specific facts in the record showing that there is a genuine issue for trial *Id.* Neither "conclusory allegations" nor "unsubstantiated assertions" will satisfy the nonmovant's burden. *Id.*

Summary judgment is inappropriate if the evidence before the court, viewed as a whole, could lead to different factual findings and conclusions. *Honore v. Douglas*, 833 F.2d 565 (5th Cir. 1987). The district court must look to the full record, including the pleadings, affidavits, and depositions. *Williams v. Adams*, 836 F.2d 958, 961 (5th Cir. 1988). Under this standard, fact questions are considered with

deference to the nonmovant. *Reid v. State Farm Mutual Automobile Insurance Co.*, 784 F.2d 577, 578 (5th Cir. 1986). The evidence of the nonmovant is to be believed and all inferences are to be drawn in his favor. *Anderson v. Liberty Lobby*, 477 U.S. 242, 255, 106 S.Ct. 2505, 2513 (1986). The Court resolves factual controversies for purposes of summary judgment in favor of the nonmoving party, but only when there is an actual controversy, that is, when both parties have submitted evidence of contradictory facts. *Little v. Liquid Air Corp.*, 37 F.3d at 1075. The Court does not, however, in the absence of any proof, assume that the nonmoving party could or would prove the necessary facts. *Wallace v. Texas Tech University*, 80 F.3d 1042, 1048 (5th Cir. 1996) (citing *Little v. Liquid Air Corp.*, 37 F.3d at 1075).

An issue is "genuine" if the evidence supporting its resolution in favor of the party opposing summary judgment, together with any inference in such party's favor that the evidence allows, would be sufficient to support a verdict in favor of the party. *St. Amant v. Benoit*, 806 F.2d 1294, 1297 (5th Cir. 1987). A "material fact" is one that might affect the outcome of the suit under governing law. *Anderson v. Liberty Lobby*, 477 U.S. at 248, 106 S.Ct. at 2510.

Discussion and Analysis

As explained above, the companion case of *Kerr v. Lyford* was recently examined by the Fifth Circuit and the Court issued a published decision. The claims asserted by the Plaintiff in this case are very similar, and at times identical to, the claims asserted by the Kerrs. Moreover, the Defendant's motions for summary judgment assert the same theories that they asserted in their motions for summary

judgment in the *Kerr* case. As a result, the Court draws much of its analysis in this case from the Fifth Circuit's analysis in *Kerr v. Lyford*.

Lyford

The Court will first address Defendant Lyford's Motion for Summary Judgment. Lyford asserts absolute immunity entitling him to summary judgment against the Plaintiff on each of his claims. Prosecutors enjoy absolute immunity for actions "intimately associated with the judicial phase of the criminal process." *Imbler v. Pachtman*, 424 U.S. 409, 430, 96 S.Ct. 984 (1976). The Plaintiff concedes that Lyford is entitled to absolute prosecutorial immunity for his prosecutorial activities.[7] He argues, however, that the acts Lyford committed amounting to a violation of his constitutional rights occurred at a time when Lyford functioned as an investigator, administrator or as an advisor to law enforcement. Such investigatory actions of a prosecutor will be protected by qualified immunity, if any, rather than prosecutorial immunity. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2736-38 (1982).[8]

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7. In his response to the Motion for Summary Judgment, the Plaintiff asserts that Lyford did not have the authority to prosecute the Plaintiff because he was not deputized as an assistant criminal district attorney until March 11, 1994. In his Supplemental Response, the Plaintiff acknowledges that the holding *Kerr v. Lyford* applies to this issue and the Plaintiff withdrew this contention. See Plaintiff's Supplemental Response to Defendants' Motions for Summary Judgment Addressing the *Kerr v. Lyford Decision*, at p. 3.

8. It does not appear that Lyford has asserted the defense of qualified immunity in his pleadings.

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Unfortunately, the Plaintiff does not delineate for the Court in his response what specific actions he alleges were taken by Lyford as an investigator, administrator or advisor to law enforcement that amounted to a constitutional violation.[9] Presumably, the Plaintiff is referring to his claims that Lyford procured the indictment against him with perjured testimony[10] and withheld exculpatory evidence from the grand jury.

To the extent the Plaintiff is claiming that Lyford presented any false, coerced or fabricated testimony to the grand jury, Lyford is protected by prosecutorial immunity. *Kerr v. Lyford*, 171 F.3d at 338. The Plaintiff appears to attempt to avoid Lyford's prosecutorial immunity by focusing on Lyford's involvement as an investigator in interviewing witnesses and allegedly obtaining the false, coerced or fabricated testimony that was presented to the grand jury. However, the creation of false evidence does not state a claim under § 1983 because it is not an action of constitutional magnitude. *See Buckley v. Fitzsimmons*, 20 F.3d 789 (7th Cir. 1994). Likewise, a prosecutor's withholding of evidence does not state a constitutional violation. *Id.*

In sum, Lyford is entitled to absolute prosecutorial immunity for actions he took in prosecuting the case against

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9. It appears that he is only alleging that Lyford committed unconstitutional acts in the capacity of an investigator. See Plaintiff's Response to the Motions for Summary Judgment Filed by Defendants Lyford, Goar, Minshew, Baggs and Fleig, at p. 30.

10. The Plaintiff asserts that the Defendants told Wanda Kerr and Connie Martin what to say and who to implicate.

the Plaintiff. To the extent the Plaintiff alleges that Lyford is liable for acts taken in an investigatory capacity, the Plaintiff has not stated a constitutional violation. Accordingly, these allegations do not state a claim under § 1983. Lyford is entitled to summary judgment on Plaintiffs § 1983 claims.

With respect to the state law claims against Lyford, Lyford is protected by absolute immunity from Plaintiff's state law malicious prosecution claim for the same reasons he is protected from a § 1983 claim of malicious prosecution. Moreover, the Court finds persuasive Lyford's assertion that the Plaintiff's state law claims of intentional infliction of emotional distress, negligence and gross negligence are simply the malicious prosecution claim recast. In any event, state officials are protected from suit except for constitutional harms. State officials are shielded from liability under qualified immunity unless they violate a constitutional right that was clearly established at the time of their conduct. *Pfannstiel v. Marion*, 918 F.2d 1178, 1183 (5th Cir. 1990). These claims do not rise to the level of constitutional violations and must be dismissed.

Goar, Minshew, Baggs and Fleig

Goar, Minshew, Baggs and Fleig assert that they are entitled to qualified immunity with respect to the Plaintiff's claims against them in their individual capacities. Additionally, Baggs argues that any claim against him in his official capacity is equivalent to a suit against a state agency and is, therefore, barred by the Eleventh Amendment. The Plaintiff asserts that his constitutional rights to be free

from unreasonable seizure, malicious prosecution, false arrest and false imprisonment were violated by these Defendants.

In this case, there are three factors to be considered: (1) whether the Plaintiff alleges a constitutional violation; (2) whether the law regarding the alleged violation was clearly established at the time of the operative events; and (3) whether the record shows that the violation occurred, or at least gives rise to a genuine issue of material fact as to whether the Defendant actually engaged in conduct that violated the clearly-established law. *Kerr v. Lyford*, 171 F.3d at 339 (citing *Rich v. Dollar*, 841 F.2d 1558, 1563 (11th Cir. 1988).

As explained by the Court in the *Kerr v. Lyford* case, Lyford's intervening, independent actions in obtaining the indictment against the Plaintiff severs any responsibility Goar, Minshew, Baggs or Fleig might have had for the Plaintiff's alleged unreasonable seizure, false arrest, and false imprisonment. *Kerr v. Lyford*, 171 F.3d at 339 (citing *Hand v. Gary*, 838 F.2d 1420, 1427 (5th Cir. 1988). The Court finds the Plaintiff's assertion that Lyford's actions were not independent unpersuasive. Accordingly, under § 1983 the Plaintiff is left with his claims of malicious prosecution and civil conspiracy.[11]

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11. The Plaintiff also asserts a claim of civil conspiracy; however, this claim is contingent upon the success of his malicious prosecution claim. In order to succeed on a claim of civil conspiracy a plaintiff must show that an actual violation of a right protected under § 1983 and actions taken in concert by the defendants with the specific intent to violate that right. *Kerr v. Lyford*, 171 F.3d at 340; *Cinel v. Connick*, 15 F.3d 1338, 1343 (5th Cir. 1994).

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In the *Kerr* case, the Court held that a claim of malicious prosecution implicated a clearly established right at the time of the events giving rise to this case. *Kerr v. Lyford*, 171 F.3d at 339. Accordingly, the next question for this Court to consider is whether the showings made by the parties create a genuine issue of material fact as to whether the defendants actually engaged in conduct that violated the clearly established law.

The first step in this analysis is to look at the seven elements of a claim of malicious prosecution:

1. criminal action commenced against the plaintiff;

2. that the prosecution was caused by the defendants or with their aid;

3. that the action terminated in the plaintiff's favor;

4. that the plaintiff was innocent;

5. that the defendants acted without probable cause;

6. that the defendant acted with malice; and

7. that the criminal proceeding damaged the plaintiff.

Hayter v. City of Mount Vernon, 154 F.3d 269, 275 (5th Cir. 1998). Assuming the Plaintiff can establish a prima facie

case of malicious prosecution, the Court then turns to consider whether the record supports the Plaintiff's allegations.

As with the *Kerr* case, most of the elements of malicious prosecution are satisfied in this case; however, the element requiring that the Defendants acted without probable cause requires examination. In the context of a claim of malicious prosecution, "probable cause" is "the existence of such facts and circumstances as would excite the belief, in a reasonable mind, acting on the facts within the knowledge of the prosecutor, that the person charged was guilty of the crime for which he was prosecuted." *Moore v. McDonald*, 30 F.3d 616, 620 n. 2 (5th Cir. 1994) (quoting *Pendleton v. Burkhalter*, 432 S.W.2d 724, 747 (Tex. Civ. App. – Houston [1st Dist.] 1968, writ ref'd n.r.e.)). For the Defendants to prevail on their motions for summary judgment, the Court must find that the undisputed facts support a finding of probable cause. *Blackwell v. Barton*, 34 F.3d 298, 305 (5th Cir. 1994).

The Defendants assert several factors in favor of a finding that there was probable cause to indict the Plaintiff. First, RS told his foster mother that the Plaintiff was involved in the Kelly Wilson murder and he previously linked the Kerr family to the Kelly Wilson disappearance, Next, Paulette Kerr told investigators on December 14, 1993, that she was afraid of the Plaintiff and that her daughter, who knew Kelly Wilson, said that the Plaintiff was dating Kelly Wilson and had been seen picking her up near the school. Third, Connie Martin implicated the Plaintiff in Kelly Wilson's disappearance and stated that he participated in sexual acts with her sons and RS. In addition, Connie Martin,

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Wanda Kerr and RS each provided similar accounts of what happened to Kelly Wilson. Fifth, the testimony of Connie Martin, Wanda Kerr, Donna Kerr Laney, Marie Gray, the Hicks children, the Kerr children and RS over an extensive period of time provided a consistent picture of extreme child abuse and ritualistic behavior among the Kerr family and people associated with them. Physical evidence obtained during the investigation corroborated some of the testimony provided by both the adults and the children. Finally, the Plaintiff's investigation of the Kelly Wilson abduction contained many irregularities which were notable in light of the other evidence.

In response the Plaintiff attacks the credibility and reliability of the evidence relied upon. At this stage in the course of events, it seems clear that the testimony provided by the children should not be considered in the probable cause determination.[12] The Plaintiff argues that the only remaining link between the disappearance of Kelly Wilson and him is Connie Martin. The Plaintiff complains that the conditions under which Connie Martin was questioned and the totality of circumstances surrounding her were so coercive and manipulative as to render her statements unreliable.

The record does not support the Plaintiff's assertion that Connie Martin's statements were the result of coercion or

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12. The charges against the Kerrs and the Plaintiff were dropped by the Texas Attorney General's office in large part due to the mishandling of the child witnesses. In addition, in *Kerr v. Lyford*, 171 F.3d at 341, the Court recognized that the children's recollections were so tainted as to render their statements nugatory in the determination of whether probable cause existed.

manipulation. The mere fact that she did not disclose information concerning the Plaintiff's alleged involvement until she had already been interviewed several times does not in itself indicate that she was coerced or manipulated into providing those statements. In addition, the portions of the December 29, 1993 interview of Connie Martin quoted by the Plaintiff do not show that Connie Martin was coerced or manipulated.[13] Interestingly, the Kerrs also asserted that Connie Martin's statements were unreliable because she was coerced and manipulated into providing the statements but the Court found no support in the record for that assertion. *See Kerr v. Lyford*, 171 F.3d at 341. Although the Plaintiff submits that this case is distinguishable from the *Kerr* case on this issue in his Supplemental Response, he does not direct the Court to any evidence in the record in this case that was not considered by the Fifth Circuit in the *Kerr* case when the Court determined that there was no support in the record for the Kerrs' claim that Connie Martin's statements were elicited via coercion and manipulation.

In this Circuit, a very low threshold exists for a probable cause finding. See *United States v. Wadley*, 59 F.3d 510, 512-13 (5th Cir. 1995) (probable cause existed to arrest a

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13. Baggs told Connie Martin, "we know what the kids have told us, what you've told us, what Wanda's told us . . . We also know what people do in these little groups, and one of the things they make you do is kill people and drink the blood and eat the body parts, and do — you know, screw the kids, and do all kinds of stuff. And most of the time they keep all their little bodies in one location, cause they like to go back and get the bones, and the skulls, and the teeth, and do things with those . . . You understand what I'm saying?" See Plaintiff's Exhibit 27, p. 11.

suspect who merely fled from police in a high crime area and "reached into his pocket" while doing so). In this case, the statements from Connie Martin implicating the Plaintiff in the disappearance of Kelly Wilson in combination with Paulette Kerr's statement that indicated the Plaintiff knew Kelly Wilson and may have been dating her provided probable cause to proceed with his prosecution. As a result, the Plaintiff's malicious prosecution claim is rejected. As explained above, the Plaintiff's civil conspiracy claim is predicated upon a finding of a constitutional violation. Having found none, the civil conspiracy claim against all Defendants is also rejected.

Having found that Goar, Minshew, Baggs and Fleig are shielded by qualified immunity, any state law claims asserted by the Plaintiff against them must be dismissed. The doctrine of qualified immunity protects public officials from suit except to the extent that a Plaintiff can show the violation of a clearly established constitutional right. *Pfannstiel v. Marion*, 918 F.2d at 1183.

Upshur County, Texas and Fleig in his Official Capacity

The Plaintiff also sues Fleig in his official capacity as an investigator with the Upshur County District Attorney's Office. In essence, this claim is tantamount to a claim against Upshur County, Texas. *Hafer v. Melo*, 502 U.S. 21, 112 S.Ct. 358 (1991).

Having determined that above that Fleig is not liable for his actions in his official or individual capacity, the county cannot be held liable for his alleged unconstitutional acts.

City of Los Angeles v. Heller, 475 U.S. 796, 106 S.Ct. 1571 (1986). If there is no liability on the individual, there can be no liability for the county. *Id.*

The Plaintiff also attempts to secure liability against Upshur County for the actions taken by Lyford. He submits that an elected district attorney may be a final policy maker for a county sufficient to give rise to county liability under § 1983. The Plaintiff argues that the county is liable for constitutional violations committed by Lyford while he was acting in his investigatory capacity. However, this argument fails because as explained above, the Plaintiff has not stated a constitutional violation committed by Lyford in his investigatory capacity. Moreover, as addressed above with respect to Fleig, the county cannot be held liable for actions taken by Lyford that the Court has determined do not give rise to liability for Lyford. Accordingly, summary judgment should be granted in favor of Upshur County and Fleig.

In light of the foregoing, it is hereby

ORDERED that Defendant Fleig's Motion for Summary Judgment (docket #244), Defendants Goar, Minshew and Baggs' Motion for Summary Judgment (docket #251), Defendant Upshur County's Motion for Summary Judgment and Supplemental Motion for Summary Judgment (docket #266 and 275) and Defendant Lyford's Motion for Summary Judgment (docket #278) are **GRANTED**.

The above-styled lawsuit is hereby **DISMISSED** with prejudice. Any motion not previously ruled on is **DENIED**.

Appendix B

SIGNED this 29th day of September, 1999.

s/ Judith K. Guthrie
JUDITH K. GUTHRIE
UNITED STATES MAGISTRATE
JUDGE

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

CIVIL ACTION NO. 6:94cv491

JAMES YORK BROWN

v.

ROLAND SCOTT LYFORD, ET AL.

FINAL JUDGMENT

The above-entitled action has come before the Court for consideration, and decision having been duly rendered, it is hereby

ORDERED and **ADJUDGED** that the Plaintiff be granted no relief and that the above-entitled action be **DISMISSED**.

SIGNED this 29th day of September, 1999.

s/ Judith K. Guthrie
JUDITH K. GUTHRIE
UNITED STATES MAGISTRATE
JUDGE

No. 00-1743

IN THE

Supreme Court of the United States

JAMES YORK BROWN,

Petitioner,

v.

ROLAND SCOTT LYFORD, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT UPSHUR COUNTY

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LIST OF PARTIES

The only other Respondent not listed in the caption with an interest in this petition is Upshur County, Texas.

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TEX. CRIM. PROC. CODE ANN. art. 2.07(a) (Vernon 1977) 12

Rule:

FED. R. CIV. P. 56(c) 6, 7

STATEMENT OF THE CASE

Respondent Upshur County is dissatisfied with the statement of the case presented by Petitioner and submits the following summary of facts relevant to this Court's decision:

A. Statement of Facts[1]

In 1990, Ann Goar ("Goar") and Debbie Minshew ("Minshew") as employees of the Texas Department of Protective and Regulatory Services were assigned to counsel the children of Loretta and Wendell Kerr. The Kerr children came into foster care upon allegations of sexual abuse leveled against Wendell Kerr. The counseling later expanded to include the children of Wanda Geer Hicks, whom Wendell Kerr had started dating. The Kerr and Hicks children began to tell of being tortured, molested, and sodomized by various individuals, including Wanda Geer, Lucas Geer, Wendell Kerr, Eugene Kerr, and Geneva Kerr. The alleged abuse included satanic rituals involving masks and knives. The children's stories related the murder, dismemberment, post-mortem rape, and cannibalism of babies and children by the abusing adults. Goar and Minshew recruited two private occult investigators, Brooks Fleig ("Fleig") and Steve Baggs ("Baggs") to assist in an investigation of these accounts by the children. Upshur County's elected district attorney, Tim Cone, moved the state district court in Upshur County to appoint a special prosecutor in the Kerr and Hicks

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1. Upshur County's statement of facts is taken, in large part, from the factual summaries contained in the Fifth Circuit's opinion and the magistrate judge's order. *See* Brown's Petition for a Writ of Certiorari, Appendices A and B, respectively.

prosecutions on the ground that he was disqualified due to a conflict of interest. The state district court appointed Roland Scott Lyford ("Lyford") "as special prosecutor to handle the above matters [six referenced cause numbers] to conclusion." The order of appointment did not confer upon Lyford any general powers relating to the district attorney's office. Lyford participated closely in the investigation, and in 1993, at Lyford's recommendation, the county hired Fleig and Baggs as criminal investigators.

There was extensive evidence of criminal activity by the Geer, Kerr, and Hicks adults. Medical examination of the children found genital and anal scarring consistent with sexual molestation. An adult, Lucas Geer, confessed to police that he participated in ritualistic child abuse and child murder, a confession corroborating the stories told by the Kerr and Hicks children. A search of the Kerr property found three shallow grave-like depressions in the soil, a shovel with blood residue on it, an area matching the children's description of where the abuses occurred, two devil masks, a blood-stained mattress cover, and four knives said by the children to have been used to murder and dismember children. Pursuant to a plea agreement, two of the charged adults identified items retrieved from the Kerr household as devices used to restrain and torture children. Finally, plastic bags were found buried on the Kerr property, containing bone fragments. Before Lyford took his evidence to the grand jury, the Texas Human Skeletal Identification Laboratory issued a report stating the remains were most probably human. Another report from a different laboratory, filed months after the indictment was issued, concluded that the remains were not human.

Despite a grand jury indictment, all charges were ultimately dropped. Child Protective Services criticized the methods of the investigators in interviewing the Kerr and Hicks children. CPS also objected to the suggestive nature of the questions asked by the investigators. An adult, Wanda Hicks, also known as Wanda Geer due to her marriage, later recanted, explaining that she developed her story out of the questions investigators put to her. Wendell Kerr had a corroborated alibi for the times of the alleged crimes, and the testimony of the child witnesses was suspect.

While the individual defendants were investigating the Kerr case, Sergeant James Brown ("Brown") was investigating the disappearance of Kelly Wilson. Wilson was 17 when she was reported missing in Gilmer, Texas. In 1993, one of the Kerr children, identified as "R.S.," claimed that Kelly Wilson had been abducted, raped, and murdered by the Kerrs. As a result, Brown's investigation began to overlap with the investigation being conducted by defendants.

R.S. implicated Brown in the charges of child abuse and the disappearance of Kelly Wilson. He stated that the police would not help, that they were also "bad," and described in general terms a person resembling Brown as having participated in the abuse. Later, Connie Martin — one of the adults involved — also implicated Brown by name. At the same time, the case against Brown had problems. Wanda Kerr was unable to identify Brown in a photo lineup. The narratives told by witnesses other than R.S. never mentioned Brown.

Lyford took this evidence to the Upshur County Grand Jury, which indicted the alleged abusers, including Brown. Brown was arrested and spent six days in jail. The charges were later dropped.

B. Course of Proceedings and Dispositions Below

On July 5, 1994, Petitioner Brown brought suit against Lyford and other individual defendants, Goar, Minshew, Fleig, and Brooks, alleging the violation of his right to be free from unreasonable seizure, malicious prosecution, false arrest, and false imprisonment. Brown also alleged that various defendants had conspired to deprive him of his constitutional rights and had committed various state law torts. On June 27, 1996, Brown amended his complaint to add Upshur County, Texas as a defendant. Lyford moved for summary judgment on the ground that he enjoyed absolute prosecutorial immunity. Upshur County moved for summary judgment on the following grounds:

1. Lyford was a state actor and not a policymaking official for Upshur County; and

2. Upshur County could not be liable for the acts of government officials who were shielded from liability by qualified immunity.

Goar, Minshew, Baggs, and Fleig also moved for summary judgment on the ground that they were immune from suit on the basis of qualified immunity.

United States Magistrate Judge Judith K. Guthrie granted Lyford summary judgment on the ground that he had absolute immunity for actions taken in prosecuting Brown and that Brown had failed to state a constitutional violation with respect to Lyford's investigative actions. Magistrate Judge Guthrie also granted summary judgment in favor of Upshur County on the ground that no county liability existed because Lyford was not liable. The court also granted summary

judgment to Goar, Minshew, Fleig, and Baggs on the ground of qualified immunity. The District Court entered judgment on September 29, 1999. Brown filed a Notice of Appeal seeking review of the District Court judgment.

The Fifth Circuit affirmed the judgment of the District Court. Regarding Brown's claims against Lyford, the Fifth Circuit held that Lyford enjoyed absolute prosecutorial immunity for his conduct before the grand jury, and like the other individual defendants, had qualified immunity for his investigatory conduct leading to the grand jury proceeding. *Brown v. Lyford*, 243 F.3d 185, 191 (5th Cir. 2001). As to Brown's claims against Upshur County, the Fifth Circuit held that Brown was not a policymaker for the county and that his actions did not impose liability on the county.

REASONS FOR DENYING THE WRIT

The summary judgment evidence proved that Lyford was not a final policymaker for Upshur County, and the County cannot be held liable for his acts. Brown presented no contrary evidence. Therefore, the Fifth Circuit correctly affirmed the trial court's judgment in favor of Upshur County.

Petitioner describes the issue as whether a district attorney pro tem can be a final policymaker for a Texas county, and states that the Fifth Circuit's answer in the negative is in conflict with other relevant decisions of this Court. This is not however, the issue that was before the Fifth Circuit, or indeed, is before this Court. The relevant inquiry is, "Did Upshur County delegate final policymaking authority to Scott Lyford, a district attorney pro tem?"

This issue has not been previously considered or decided by this Court as it is wholly dependent upon the summary judgment evidence presented to the trial court.

Brown's sole reason that this Court should grant a writ of certiorari demonstrates his misunderstanding of the Fifth Circuit's holding. He states:

> The Fifth Circuit's decision that a District Attorney Pro Tem cannot be a final policymaker for purposes of establishing *Monell* liability against a Texas County under 42 U.S.C. § 1983 is in conflict with relevant decisions of the Court.

However, a careful reading of the Fifth Circuit opinion reveals that the intermediate court did not hold that a district attorney pro tem cannot be a final policymaker for a Texas county, but rather that Petitioner presented no evidence that Lyford acted as a policymaker for Upshur County.

I. Summary Judgment Standard

Summary judgment is authorized if the movant establishes that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c). Facts are considered "material" if they "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986). A material fact creates a "genuine issue" if the evidence is such that the trier of fact reasonably could resolve the factual dispute in favor of either party. *Anderson*, 477 U.S. at 249, 106 S. Ct. at 2511. This Court has interpreted the plain language of Rule 56(c) to mandate "the entry of summary

judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986).

If the party moving for summary judgment demonstrates the absence of a genuine issue of material fact, Rule 56(c) requires the nonmovant to go beyond the pleadings and show by affidavits, depositions, answers to interrogatories, admissions on file, or other admissible evidence that specific facts exist over which there is a genuine issue for trial. *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994). The party opposing summary judgment is required to identify specific evidence in the record and to articulate the precise manner in which that evidence supports that party's claim. *See Forsyth v. Barr*, 19 F.3d 1527, 1537 (5th Cir. 1994).

Unsupported allegations or affidavit or deposition testimony asserting ultimate or conclusory facts and conclusions of law are not sufficient to defeat a motion for summary judgment. *Duffy v. Leading Edge Products, Inc.*, 44 F.3d 308, 312 (5th Cir. 1995) (citing *Anderson*, 477 U.S. at 247, 106 S. Ct. at 2509-10). Factual controversies are to be resolved in favor of the nonmovant, "but only when there is an actual controversy, that is, when both parties have submitted evidence of contradictory facts." *Little*, 37 F.3d at 1075. Unless there is sufficient evidence for a jury to return a verdict in the nonmovant's favor, there is no genuine issue for trial. *Anderson*, 477 U.S. at 249, 106 S. Ct. at 2511.

In the summary judgment context, a trial court will only consider evidence that would be admissible at trial. *See Lavespere v. Niagia*, 910 F.2d 167, 176 (5th Cir. 1990). Inadmissible material may not be considered because it could not be used to establish a genuine issue of fact at trial. *Duplantis v. Shell Offshore, Inc.*, 948 F.2d 187, 191 (5th Cir. 1991). A court may not consider hearsay or unsworn documents as summary judgment evidence. *Martin v. John W. Stone Oil Distrib., Inc.*, 819 F.2d 547, 549 (5th Cir. 1987). Likewise, unauthenticated documents are not proper summary judgment evidence. *King v. Dogan*, 31 F.3d 344, 346 (5th Cir. 1994).

Many of the "facts" relied upon by Brown were not properly before the trial court. A trial court may only consider evidence that would be admissible at trial. Petitioner's statement of facts frequently refers to unsworn, unauthenticated interview transcripts, unauthenticated grand jury testimony, the unsworn, unauthenticated testimony of Dr. Richard Ault, and the unauthenticated hearsay testimony of Bruce Perry. Respondent objected to all of this material in the trial court. Although Petitioner includes this material in his statement of facts, it could not have been considered by the trial court because it was not proper summary judgment evidence.

II. County Liability

Under 42 U.S.C. § 1983, a county is not vicariously liable for the acts of its employees. *Monell v. Dep't of Social Services*, 436 U.S. 658, 694, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). A person seeking to impose such liability on a county must do more than simply prove that the county employed a tortfeasor. *Monell*, 436 U.S. at 692. A county is

only liable under section 1983 for acts for which the entity itself is responsible. *St. Louis v. Praprotnik*, 485 U.S. 112, 123, 108 S. Ct. 915, 924, 99 L. Ed. 2d 107 (1988). Under section 1983, a municipality may be liable for constitutional violations caused by any of the following:

1. An officially promulgated policy of the municipality, *Monell*, 436 U.S. at 690, 694;

2. A custom or persistent practice of the municipality, *Monell*, 436 U.S. at 690-91;

3. A single decision by a municipal official with final policymaking authority, *Praprotnik*, 485 U.S. at 143 (Brennan, J., concurring); *Pembaur v. Cincinnati*, 475 U.S. 469, 480-81, 106 S. Ct. 1292, 89 L. Ed. 2d 452 (1986).

In order to determine whether a county employee is a final policymaker, courts must rely on state law. *Praprotnik*, 485 U.S. at 123. As the Fifth Circuit includes Texas, that circuit's expertise is instructive in determining Texas state law. *McMillian v. Monroe County*, 520 U.S. 781, 786-87, 117 S. Ct. 1734, 1737, 138 L. Ed. 2d 1 (1997).

III. An Elected District Attorney as Final Policymaker for the County He Serves

A county may only be held liable for acts of a district attorney when he functions as a final policymaker for that county. *Esteves v. Brock*, 106 F.3d 674, 678 (5th Cir. 1997). It is the duty of a court to identify officials who speak with final policymaking authority for a county concerning the action alleged to have caused the constitutional violation.

Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701, 737, 109 S. Ct. 2702, 105 L. Ed. 2d 598 (1989). In order to impose liability on a county, the challenged action must have been taken pursuant to a policy adopted by the official responsible under state law for making policy in that area of the county's business. *Praprotnik*, 485 U.S. at 123.

Texas law provides that a county is not liable for a district attorney's prosecutorial actions taken in the course of judicial proceedings. In *Esteves*, Victor Esteves, an African-American, filed a pro se complaint and alleged that Leslie Brock, while acting as Assistant District Attorney for Harris County, Texas, violated Esteves' right to equal protection of the laws by excluding blacks from the jury that convicted him of aggravated robbery. *Esteves v. Brock*, 106 F.3d 674, 676 (5th Cir. 1997). Esteves alleged that Harris County was liable for Brock's actions.[2] Harris County filed a motion for summary judgment contending that Brock was not a final policy maker for the county, and the county could not be sued for her actions either directly or on the basis of *respondeat superior*. *Id.* at 676. The Fifth Circuit held that neither an Assistant District Attorney nor a County can be held liable for prosecutorial actions taken on behalf of the State in the course of judicial proceedings. Applying Texas law, the court held that when acting in the prosecutorial capacity to enforce state penal law, a district attorney is an agent of the State, not of the county in which the criminal case happens to be prosecuted. Counties may, however, be liable for the actions of a district attorney who functions as a final policy maker for the county. *Id.* at 768 (citing *Familias*

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2. In *Esteves v. Texas*, 859 S.W.2d 613 (Tex. App. – Houston [1st Dist.] 1993, pet. ref'd), Esteves' conviction was reversed on a finding that Brock had used peremptory challenges to strike three black jurors from the jury panel in violation of *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). *Esteves*, 106 F.3d at 676.

Unidas v. Briscoe, 619 F.2d 391, 404 (5th Cir. 1980) (court determined that a county can be liable for non-judicial actions taken by a county judge in his role as final policy maker for the county)).

While not liable for prosecutorial acts, a county may be liable for the acts of its elected district attorney when he acts in an administrative or managerial capacity. An elected county official "holds virtually absolute sway over the particular tasks or areas of responsibility entrusted to him by state statute and is accountable to no one other than the voters for his conduct therein." *Familias Unitas*, 619 F.2d at 404 (discussing county liability for actions of county judge).

Two Fifth Circuit cases have found county liability for the managerial acts of elected district attorneys. In *Davis v. Ector County*, Davis was an investigator assigned to the Permian Basin Drug Task Force, supervised by Garrison, the elected district attorney. 40 F.3d 777, 780 (5th Cir. 1994). Davis ignored a warning from Garrison and involved himself in his wife's sexual harassment suit against Ector County Sheriff's Department. Garrison ultimately terminated Davis for defying him. The Fifth Circuit held that Garrison was a policymaker for the county because he enjoyed free reign over the district attorney's office and set departmental policy without oversight. In *Crane v. Texas*, Crane alleged that he suffered constitutional injury due to Dallas County's unconstitutional policy of issuing misdemeanor capias without a finding of probable cause by a neutral and detached magistrate in violation of federal constitutional guarantees and state statute. 759 F.2d 412, 414 (5th Cir. 1985). The county's elected district attorney, Henry Wade, formulated and implemented the procedure for issuing misdemeanor

capias. Among the issues in the case was whether Wade was a final policymaker for Dallas County. After Crane challenged the procedure on constitutional grounds, Wade altered the policy to conform to constitutional and statutory requirements. The Fifth Circuit held Wade was a final policymaker for Dallas County, stating,

> The county in this case acted through the District Attorney; he selected the means by which the county would achieve a sound and legally sufficient capias system. His choice of an unsound and legally insufficient system represents county policy for which the county is liable.

Crane, 759 F.2d at 430.

IV. A District Attorney Pro Tem as a Final Policymaker

Texas law provides for the appointment of an attorney pro tem when the elected district attorney is absent or disqualified. "Whenever an attorney for the state is disqualified to act in any case . . . , the judge of the court in which he represents the state may appoint any competent attorney to perform the duties of the office during the absence or disqualification of the attorney for the state." TEX. CRIM. PROC. CODE ANN. art. 2.07(a) (Vernon 1977). An attorney pro tem takes the place of the disqualified district attorney and assumes all the district attorney's powers and duties in the case. *State v. Rosenbaum*, 852 S.W.2d 525, 528 (Tex. Crim. App. 1993) (order appointed district attorney pro tem to "investigate" and "prosecute" a case). An attorney pro tem assumes the duties of the elected district attorney and replaces the district attorney in performing germane functions of the office related to the purposes contemplated

by the appointment. *Stephens v. State*, 978 S.W.2d 728, 731 (Tex. App. – Austin 1998, pet. ref'd).

V. Upshur County Is Not Liable for Lyford's Actions

Upshur County is not liable for Lyford's prosecutorial acts. When Lyford acted in a prosecutorial capacity, he was enforcing Texas penal law, and was an agent of the State of Texas, not Upshur County. Therefore, when Lyford initiated criminal proceedings against Brown to enforce state law, Upshur County was not liable for his actions.

Neither is Upshur County liable for any non-prosecutorial act of Lyford because Lyford was not a final policymaker for Upshur County. Tim Cone, not Lyford, was the elected district attorney of Upshur County. As such, Cone was responsible for the general management and administration of his office. A state district judge appointed Lyford to handle six cases. The uncontroverted summary judgment evidence established that Lyford was not a final policymaker for Upshur County. Upshur County authority rested in her elected officials, the commissioners, County Judge Charles L. Still, Sheriff R.D. Cross, and Criminal District Attorney Tim Cone. None of these officials delegated final policymaking authority to Lyford, and Brown presents no evidence to the contrary. Further, Brown presented no evidence that Lyford exceeded his role as prosecutor pro tem so as to function as the final policymaking authority for Upshur County in the investigation of the cases assigned to him. Instead, the summary judgment evidence established that Lyford acted for the district attorney only in regard to a few cases. He did not assume administration or management of the district attorney's office, or indeed for the cases assigned to him. For example, Lyford wanted to hire investigators, but was not authorized to do so. He could only recommend that the county hire them.

CONCLUSION

This Court should deny Brown's petition for writ of certiorari. There was simply no evidence that Lyford acted as a final policymaker for Upshur County. Brown's efforts to disguise this case as one about the role of a district attorney pro tem are misleading. This case is about the evidence presented to the court, and the evidence conclusively established that Lyford was not vested with final policymaking authority for Upshur County. Brown presented no evidence to the contrary.

Wherefore, Upshur County respectfully requests that this Court deny Brown's petition.

Respectfully submitted,

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